No. 126, Original

In The

Supreme Court of the United States

October Term, 1998

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA,

and

STATE OF COLORADO,

Defendants.

ANSWER AND COUNTERCLAIM OF THE STATE OF NEBRASKA

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April 16, 1999

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ANSWER

The State of Nebraska ("Nebraska"), Defendant, pursuant to the Order of this Court of January 19, 1999, for its answer to the Bill of Complaint ("Complaint") filed by the State of Kansas ("Kansas"), Plaintiff, states:

1. Nebraska admits the averments set forth in Paragraph 1 of the Complaint to the extent that jurisdiction of this Court is founded under Const. art. III, § 2, cl. 2. Nebraska denies the remaining averments set forth in Paragraph 1 for the reason that this Court's jurisdiction is not properly invoked in this case.

2. Nebraska admits the averments set forth in Paragraph 2 of the Complaint to the extent that the Republican River is an interstate river which rises in the plains of northeastern Colorado, northwestern Kansas, and southwestern Nebraska, flows east through southern Nebraska, roughly paralleling the Kansas-Nebraska state line, and then, at a point east of Guide Rock, Nebraska, it turns south into the State of Kansas where it joins the Smoky Hill River. Nebraska denies the remaining averments of Paragraph 2 of the Complaint.

3. Nebraska admits the averments set forth in Paragraph 3 of the Complaint, but denies those averments that suggest the only purposes of projects constructed and operated by the federal government are for flood control and irrigation.

4. Nebraska admits the averments set forth in Paragraph 4 of the Complaint, except the averment that the Compact is "enforceable," which Nebraska denies.

5. Nebraska denies the averments set forth in Paragraph 5 of the Complaint for the reason that Article III of the Compact speaks for itself.

6. Nebraska admits the averments set forth in Paragraph 6 of the Complaint to the extent that Article IV of the Compact allocates the virgin water supply of the Republican River Basin between the three compacting States for beneficial consumptive use. Nebraska denies the remaining averments of Paragraph 6 of the Complaint for the reason that Article III of the Compact speaks for itself.

7 Nebraska denies the averments set forth in Paragraph 7 of the Complaint.

8. Nebraska admits the averments set forth in Paragraph 8 of the Complaint to the extent that the Compact does not mention or refer to groundwater use. Nebraska denies the remaining averments set forth in Paragraph 8 of the Complaint.

9. Nebraska denies the averments set forth in Paragraph 9 of the Complaint.

10. Nebraska denies the averments set forth in Paragraph 10 of the Complaint.

11. Nebraska denies the averments set forth in Paragraph 11 of the Complaint.

12. Nebraska denies the averments set forth in Paragraph 12 of the Complaint.

13. Nebraska denies the averments set forth in Paragraph 13 of the Complaint.

14. Nebraska admits the averments set forth in Paragraph 14 of the Complaint to the extent that Nebraska has suggested, pursued, and participated in negotiations with Kansas to resolve disputes arising under the Compact and that no settlement agreement has been reached. Nebraska denies the remaining averments set forth in Paragraph 14 of the Complaint.

15. Nebraska denies the averments set forth in Paragraph 15 of the Complaint.

16. Nebraska denies the averments set forth in Paragraph 16 of the Complaint.

17. Nebraska denies any and all averments in any unnumbered paragraph or prayer in the Complaint except those averments expressly admitted herein or constituting an admission against the interest of Kansas.

AFFIRMATIVE DEFENSES

18. Nebraska incorporates each and every admission, denial, and averment made by Nebraska in Paragraphs 1 through 17 as though fully set forth herein. Nebraska asserts separately and/or alternatively, even if inconsistent, the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

19. Kansas' claims are barred, in whole or in part, because groundwater is not apportioned under the Compact.

SECOND AFFIRMATIVE DEFENSE

20. Kansas has failed to state a claim upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

21. Kansas' claims are barred, in whole or in part, by the doctrine of estoppel.

FOURTH AFFIRMATIVE DEFENSE

22. Kansas' claims are barred, in whole or in part, by the doctrine of waiver.

FIFTH AFFIRMATIVE DEFENSE

23. Kansas has failed to mitigate any harm or injury it may have suffered by Nebraska's alleged violations of the Compact.

SIXTH AFFIRMATIVE DEFENSE

24. Kansas' claims are barred, in whole or in part, by the doctrine of laches.

SEVENTH AFFIRMATIVE DEFENSE

25. Kansas' claims are barred, in whole or in part, by impossibility of performance.

EIGHTH AFFIRMATIVE DEFENSE

26. Kansas' claims are barred, in whole or in part, by Kansas' consent.

NINTH AFFIRMATIVE DEFENSE

27 Kansas' claims are barred, in whole or in part, by performance by Nebraska.

TENTH AFFIRMATIVE DEFENSE

28. Kansas' claims are barred by Kansas' failure to join an indispensable party.

ELEVENTH AFFIRMATIVE DEFENSE

29. Kansas' claims are barred, in whole or in part, by the doctrine of unclean hands.

TWELFTH AFFIRMATIVE DEFENSE

30. Nebraska is excused from performing the Compact by reason of Kansas' material breach of the Compact prior to any alleged breach by Nebraska.

THIRTEENTH AFFIRMATIVE DEFENSE

31. Kansas' claims are barred, in whole or in part, by set-off.

FOURTEENTH AFFIRMATIVE DEFENSE

32. Kansas' claims are barred, in whole or in part, by its election of remedies.

FIFTEENTH AFFIRMATIVE DEFENSE

33. Kansas' claims are barred, in whole or in part, by Kansas' failure to exhaust all administrative remedies.

SIXTEENTH AFFIRMATIVE DEFENSE

34. Kansas' claims are barred, in whole or in part, by the intervening actions of the United States.

COUNTERCLAIMS

Pursuant to FED. R. CIV. P. 8 and 13, Nebraska asserts the following counterclaims against Kansas, even if found to be alternative to or inconsistent with Nebraska's other claims or defenses in this action, stating and alleging as follows:

JURISDICTION AND VENUE

1. Jurisdiction and venue are proper before this Court pursuant to Article III, Section 2, Clause 2 of the

Constitution of the United States in conjunction with 28 U.S.C. Section 1251(a) for the reason that this is a controversy between more than two States.

INTRODUCTION

2. The laws of Nebraska, Kansas and Colorado each share the long-established principle that water may be appropriated only for a *beneficial* use. This concept served as the philosophical bedrock of the Compact: "Beneficial consumptive use is the basis and principle upon which the allocations of water hereinafter made are predicated." *See* Compact Art. II.

3. At the time the Compact was entered, irrigation through the use of groundwater was neither well-developed nor envisioned as becoming significant in the Republican River Basin. While rivers like the North Platte and Arkansas were fully appropriated by 1942, the waters of the Republican were largely unappropriated. This situation allowed Kansas, Nebraska and Colorado greater flexibility to *fully* apportion the waters of the Republican River for beneficial consumptive use. Since enactment of the Compact, the construction and operation of federally owned reservoirs have allowed the beneficial use of water for irrigation in Kansas, Nebraska and Colorado. Water entering Kansas from Nebraska has consistently been measured to be in excess of Kansas' historical use and allocation.

4. Kansas has reported to the Compact Administration that its beneficial consumptive use of water within the Republican River Basin has been substantially less

than Kansas' allocation under the Compact. Municipal desires *outside the Republican River Basin* have, however, led Kansas to demand more water from Nebraska. Since 1996, Kansas has interrupted the duties of the Compact Administration by failing and refusing to supply critical data to the Compact Administration as it had previously agreed.

STATEMENT OF FACTS

Groundwater Under the Compact

5. The Republican River Compact equitably apportions the waters of the Republican River to the States of Colorado, Nebraska, and Kansas for beneficial consumptive use. See Compact Art. III. Because portions of Kansas lie both upstream as well as downstream of Nebraska, Kansas received apportionments of water covering two separate geographic areas. See Compact Art. IV. At the time the Compact was entered, none of the compacting States had laws authorizing the regulation of groundwater to protect surface water flows.

6. The term "groundwater" is not found in the Compact. Nebraska has consistently taken the position that use of groundwater is not governed by the Compact.

7. At the time the Compact was entered, the quantity of groundwater in the Republican River Basin was unknown and not included in the calculations of "virgin water supply" or the apportionment of the waters of the Republican River. Only the surface water flow measurements were used in the calculations of "virgin water supply" and the apportionment. It is not possible today

to include groundwater within the calculations or apportionment.

8. On July 15, 1959, officials from the States of Colorado, Kansas, and Nebraska met in Denver, Colorado to formally establish the Compact Administration and conduct its first annual meeting. At that meeting, Compact Administration officials discussed, among other things, the need to collect data pursuant to Article IX of the Compact. Article IX states, in pertinent part: "It shall be the duty of the three states through the official in each state charged with the duty of administering the public water supplies to collect and correlate the data necessary for the proper administration of the provisions of this Compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this Compact." A Committee on Procedure for Computation of Annual Virgin Water Supply ("Compact Formula Committee") was later formed by Kansas, Nebraska and Colorado to create formulas ("Compact Formulas") for computing the water of the Republican River.

9. On April 27, 1964, the Compact Administration unanimously adopted Compact Formulas developed by the Compact Formula Committee that computed the annual "virgin water supply" and beneficial consumptive use of waters of the Republican River. Implementation of the Compact Formulas was, and has remained, completely dependent upon each State and the United States providing the data required by Article IX of the Compact. *See* Appendices A and B, true and accurate copies of the "general procedures" of the Compact Formulas. ("Diversions from groundwater shall be limited to those by wells

pumping from the alluvium along the stream channels. The determination of the effect of pumping by upland wells on the flows of the streams in the Republican River Basin must await considerably more research and data.")

10. To administer the surface water, the Compact Formulas provided only for consideration of water that is effectively part of the flow of the river, whether in or near the bed. The Compact Administration has, for more than three decades, determined that only surface flows of the Republican River, as defined by the Compact Formulas, are apportioned by the Compact. In this lawsuit, Kansas asks this Court to dismantle over thirty years of Compact interpretation by the parties and declare that groundwater, across thousands of square miles of the Republican River Basin, is apportioned under the Compact. The Compact Formulas do not so provide.

Use by Kansas

11. Data supplied by Kansas to the Compact Administration shows that Kansas failed to put to beneficial consumptive use approximately two-thirds of the water it *received* from Nebraska for the years 1959 to 1994. Attached as Appendix C is a true and correct graphic representation of this data.

12. The data supplied by Kansas to the Compact Administration for the years 1966 to 1994 shows that Kansas overconsumed water allocated to it under the Compact in that portion of Kansas that lies upstream of Nebraska.

13. At the 1997 and 1998 Annual Compact Meetings, Kansas officials failed and refused to supply data ("Republican River Data") to Nebraska, Colorado and the United States relating to streamflow and the consumptive use of Republican River water in accordance with Article IX of the Compact.

United States as a Party to the Compact

14. After passage of the Compact in 1943, the United States began construction, operation and maintenance of nine major reservoirs within the Republican River Basin. At that same time, the United States engaged in soil and water conservation efforts within the Republican River Basin. Through contracts with irrigation districts in the Republican River Basin, the United States can and does exercise control of the waters of the Republican River. The actions of the United States have impacted the water supply of the Republican River and contributed to any decline in streamflows entering Kansas.

15. By signing the Compact, the United States obligated itself to perform certain duties and retained certain rights and powers under the Compact pursuant to Articles IX, X, XI and Sec. 2(a).

FIRST CLAIM FOR RELIEF

(Breach of Compact by Overuse of Water Upstream in Kansas)

16. Nebraska incorporates by reference the allegations in Paragraphs 1 through 15 of the Counterclaim as though fully set forth herein.

17. Kansas made a promise under the Compact to limit its consumption in accordance with the amounts specified in Article IV of the Compact.

18. Kansas breached its promise under Article IV of the Compact by consuming more water than allocated to it in that portion of the Republican River lying upstream of Nebraska.

19. Nebraska has been damaged as a result of Kansas' breach of Article IV of the Compact in an amount to be proven at trial.

SECOND CLAIM FOR RELIEF

(Breach of Compact for Failing to Supply Required Data)

20. Nebraska incorporates by reference the allegations in Paragraphs 1 through 15 of the Counterclaim as though fully set forth herein.

21. Kansas made a promise to provide the Republican River Data to the Compact Administration under Article IX of the Compact.

22. Kansas breached its promise under Article IX of the Compact by failing and/or refusing to provide the Republican River Data required by Article IX of the Compact.

23. Nebraska has been damaged as a result of Kansas' failure to provide the Republican River Data, in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF

(Declaratory Judgment)

24. Nebraska incorporates by reference the allegations in Paragraphs 1 through 15 of the Counterclaim as though fully set forth herein.

25. There is an actual controversy between Nebraska and Kansas regarding the use of the waters of the Republican River.

26. Under the Compact, Nebraska has the legal right to put to beneficial use any of the waters of the Republican River that are not put to beneficial consumptive use within the Republican River Basin by Kansas or Colorado.

WHEREFORE, Nebraska respectfully prays that the Court:

(a) Dismiss the Complaint filed by Kansas with prejudice;

(b) Award Nebraska any and all damages, including pre- and post-judgment interest, and any other and further relief appropriate to remedy the injuries suffered by Nebraska by reason of Kansas' past and continuing violations of the Compact;

(c) Order Kansas to supply Republican River Data for each of 1995, 1996 and 1997 as required by the Compact for purposes of Compact Administration;

(d) Issue a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring Nebraska's right under the Compact to beneficially consume, within the Republican River

Basin, such quantities of water that are not put to beneficial consumptive use by Kansas or Colorado; and

(e) Grant such costs and expenses, including reasonable attorney fees, to Nebraska as allowed by law or as the Court deems just and proper.

Respectfully submitted this 16th day of April, 1999.

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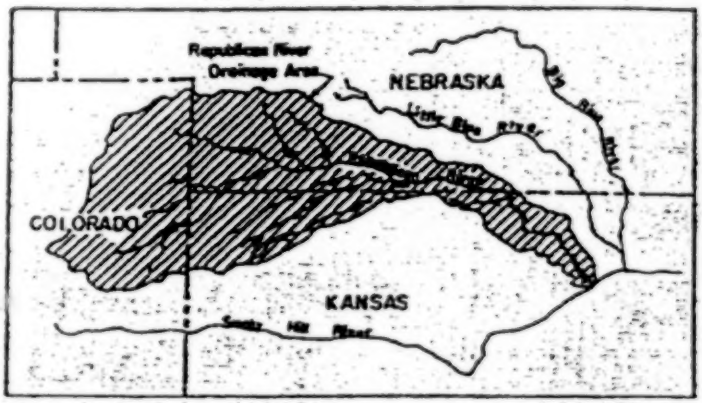
REPUBLICAN RIVER COMPACT ADMINISTRATION



Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use

Revised
June 1990

GENERAL PROCEDURES

Net reservoir evaporation shall be the total evaporation corrected for the precipitation upon the reservoir surface area.

Average monthly reservoir surface areas shall be computed by applying the average of the daily reservoir elevations to the most recent area table.

Depletion of stream flows due to erosion control practices, stockwater ponds, and municipal and industrial diversions of less than 50 acre-feet have not been included in the present virgin water supply formulas.

Diversions from surface water for this computation shall include diversions for irrigation, municipal and industrial uses.

Diversions from groundwater shall be limited to those by wells pumping from the alluvium along the stream channels for municipal, industrial and irrigation uses. The determination of the effect of pumping by upland wells on the flows of the streams in the Republican River Basin must await considerably more research and data. The wells in the Frenchman Creek drainage basin in Colorado have been considered as upland wells.

Return flows from the lands irrigated by major project developments flowing into two or more designated drainage basins shall be divided in the ratio of the irrigated lands from which the water returns to each drainage basin.

Return flows are considered to be reflected in stream discharge records during the same year the diversions are made.

Industrial uses shall include diversions relating to manufacturing and commercial practices.

REPUBLICAN RIVER COMPACT ADMINISTRATION

Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use

Revised
August 1982

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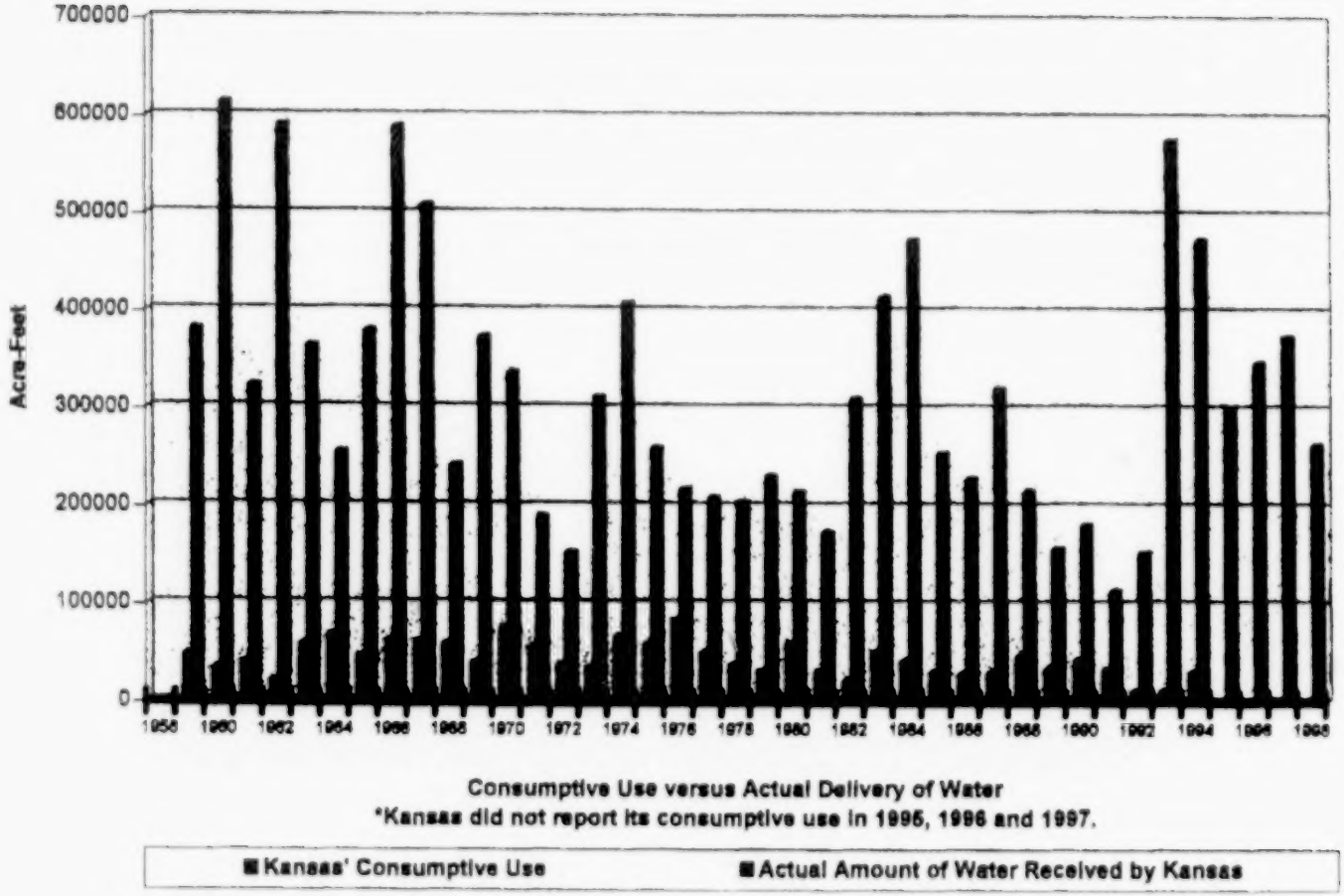
APPENDIX C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Consumptive Use versus Actual Delivery of Water
*Kansas did not report its consumptive use in 1995, 1996 and 1997.
Kansas' Consumptive Use
Actual Amount of Water Received by Kansas